

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT CLARIFICATION NO. 3-91:

MISSOULA ELEMENTARY SECRETARY'S)
CLASSIFIED ASSOCIATION, MEA/NEA,)

Petitioner,)

- vs -)

MISSOULA SCHOOL DISTRICT NO. 1,)

Respondent.)

FINAL ORDER

* * * * *

The Findings of Fact; Conclusions of Law; and Recommended Order were issued by Hearing Examiner Stan Gerke on December 4, 1991.

Exceptions to the Findings of Fact; Conclusions of Law; and Recommended Order were filed by Emilie Loring, Attorney for Petitioner, on December 20, 1991. Respondent's Exceptions were filed by Don K. Klepper on December 23, 1991.

Oral argument was scheduled before the Board of Personnel Appeals on Wednesday, February 26, 1992.

After reviewing the record, considering the briefs and oral arguments, the Board orders as follows:

1. IT IS ORDERED that the Exceptions to the Findings of Fact; Conclusions of Law; and Recommended Order are hereby denied.

2. IT IS ORDERED that this Board therefore adopts the Findings of Fact; Conclusions of Law; and Recommended Order of Hearing Examiner Stan Gerke as the Final Order of this Board.

DATED this 8th day of April, 1992.

BOARD OF PERSONNEL APPEALS

BY *Robert A. Poore*
ROBERT A. POORE
CHAIRMAN

* * * * *

NOTICE: You are entitled to Judicial Review of this Order. Judicial Review may be obtained by filing a petition for Judicial Review with the District Court no later than thirty (30) days from the service of this Order. Judicial Review is pursuant to the provisions of Section 2-4-701, et seq., MCA.

* * * * *

CERTIFICATE OF MAILING

I, *Jennifer Jacobson*, do hereby certify that a true and correct copy of this document was mailed to the following on the 13th day of April, 1992:

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2 STATE OF MONTANA
3 DEPARTMENT OF LABOR AND INDUSTRY
4 BEFORE THE BOARD OF PERSONNEL APPEALS

5 IN THE MATTER OF UNIT CLARIFICATION NO. 3-91:

6 MISSOULA ELEMENTARY)
7 SECRETARY'S CLASSIFIED)
8 ASSOCIATION, MEA, NEA,)
9)
10 Petitioner,) FINDINGS OF FACT;
11) CONCLUSIONS OF LAW;
12) AND
13 -vs-) RECOMMENDED ORDER
14)
15 MISSOULA SCHOOL DISTRICT)
16 NO. 1,)
17)
18 Respondent.)

19 * * * * *

20 I. INTRODUCTION

21 A formal hearing in the above entitled matter was conducted
22 May 20, 1991, in the School Administration Building, Missoula,
23 Montana. The hearing was conducted under authority of Section 39-
24 31-207 MCA, pursuant to ARM 24.26.630, and in accordance with the
25 Montana Administrative Procedure Act, Title 2, Chapter 4, MCA. The
Petitioner was represented by Emilie Loring, Attorney at Law,
Missoula, Montana. The Respondent was represented by Don K.
Klepper, Ph.D., Director of Personnel, Missoula School District No.
1. Witnesses included Sandy Buchek, UniServ Director, Montana
Education Association, NEA; Tom Kallay, Indian Education
Coordinator; Mike Vance, Assistant Superintendent for Curriculum
and Instruction; Jan Larson, building secretary at C.S. Porter
school and President, Missoula Elementary Secretaries Classified

1 Association, MEA, NEA; Melanie Graham, Art Aide/Secretary; Cathy
2 Sandell, Fine Arts secretary; Toni Smartt, coordinator of health
3 programs; Carl Smart, Fine Arts Supervisor; and, Lauren Risinger,
4 Personnel Specialist.

5 II. BACKGROUND

6 On January 11, 1991, the Petitioner filed two Petitions for
7 Unit Clarification with this Board. In one Petition, the
8 Petitioner sought to transfer the position of Art Aide from the
9 existing bargaining unit known as the Missoula Elementary
10 Assistants and Paraprofessionals Classified Association, MEA, NEA
11 to an existing bargaining unit known as the Missoula Elementary
12 Secretaries Classified Association, MEA, NEA. The Petitioner
13 contends the duties and responsibilities of the Art Aide position
14 are more similar to those performed by positions in the
15 "Secretaries" unit than compared to the "Assistants and
16 Paraprofessionals" unit. In the second Petition, the Petitioner
17 sought to include a newly created position, Central Office
18 Clerk/Typist, in the "Secretaries" unit. The Petitioner contends
19 there is no reason for the position's exclusion because it does not
20 fit any of the contractual exclusions from the bargaining unit.
21 Both Petitions for Unit Clarification were consolidated into Unit
22 Clarification No. 3-91 for purposes of adjudication.
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III. ISSUES

1. Whether the position of Art Aide should be included in the "Secretaries" existing bargaining unit.

2. Whether the position of Central Office Clerk/Typist should be included in the "Secretaries" existing bargaining unit.

IV. FINDINGS OF FACT

1. The Montana Education Association, NEA, is the umbrella labor organization which represents certain individuals employed by the Missoula Elementary School District. Two collective bargaining units exist - Missoula Elementary Assistants and Paraprofessionals Classified Association, MEA, NEA ("Assistants and Paraprofessionals") and the Missoula Elementary Secretaries Classified Association, MEA, NEA ("Secretaries").

2. Melanie Graham is the current incumbent of the Art Aide position. The Art Aide position has been and is currently included in the Assistants and Paraprofessionals bargaining unit.

3. The definition of the appropriate Assistants and Paraprofessionals bargaining unit is stated in the Agreement between the Board of Trustees Missoula School District One and the Missoula Elementary Assistants and Paraprofessionals Classified Association, MEA, NEA, effective July 1, 1989 - June 30, 1991 (Respondent's Exhibit No. 4) Section 1.2, Appropriate Unit:

The appropriate unit shall consist of those employees classified as Instructional Assistants and/or Paraprofessionals but shall exclude the following:

1. Those excluded by the Act (Title 39, Chapter 31, MCA)
2. Substitute or casual employees who are employed in the same position less than forty-five (45) consecutive working days. Bargaining unit positions must be posted and filled within forty-five (45) days of the regular employees' vacancy.
3. Temporary employees who are hired to replace a regular employee on leave or to fill a unique non-bargaining position.
4. Nothing in this Article requires the employer to fill vacancies.

4. The definition of the appropriate Secretaries bargaining unit is stated in the Agreement between the Board of Trustees Missoula School District One and the Missoula Elementary Secretaries Classified Association, MEA, NEA, effective July 1, 1989 - June 30, 1991 (Respondent's Exhibit No. 2) Section 2.2, Appropriate Unit:

The exclusive representative shall represent members of the appropriate unit which shall consist of all employees employed as secretaries but shall exclude the following:

1. Those excluded by the Act (Title 39, Chapter 31, MCA)
2. Federal Projects Secretary
3. Personnel Secretary
4. Accounting and Insurance Specialist
5. Payroll and Operations Specialist
6. Executive Secretary
7. Curriculum Secretary
8. Printer's Helper
9. A. Substitute or casual employees who are employed in the same position less than forty-five (45) consecutive working days. Bargaining unit positions must be posted and filled within forty-five (45) days of the regular employees' vacancy.

1
2 B. Temporary employees who are hired to
replace a regular employee on leave or to
fill a unique non-bargaining position.

3 C. Nothing in this section requires the
employer to fill the vacancy, however.

4 10. Purchasing/Accounting Secretary

5 The Agreement further describes the appropriate unit in
6 Appendix A, Salary Schedule by a listing of position
7 classifications:

8 **CLASSIFICATION ASSIGNMENT:**

9 Classification I Special Education Secretary
Purchasing/Accounting Secretary

10 Classification II Building Secretaries
11 Fine Arts Secretary
12 Food Service Secretary
13 Central Processing Secretary
14 Central Office Receptionist

15 5. Both the Assistants and Paraprofessional Agreement and
16 the Secretaries Agreement contain identical language under Article
17 13 - Board Rights in Section 13.1, part 5 which provides:

18 The Association recognizes the prerogatives of the
19 Board to operate and manage its affairs in such
20 areas as, but not limited to:

- 21 1. ---
22 2. ---
23 3. ---
24 4. ---
25 5. Determine the methods, means, job
classifications, and personnel by which
government operations are to be conducted.
6. ---
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6. The duties that Melanie Graham performs in the position
of Art Aide are similar to the duties performed by secretarial and

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clerical personnel included in the Secretaries bargaining unit and covered by the Secretaries Agreement. Ms. Graham does purchase and prepare art supplies for the art teachers, however, the majority of her time is spent on clerical and secretarial duties. Ms. Graham rarely works with art teachers in a classroom setting and rarely has contact with students. Rather, she spends the majority of her time in an office setting and is supervised by Fine Arts Supervisor, Carl Smart.

7. Should Ms. Graham be allowed, in some manner, to transfer from the Assistants and Paraprofessionals bargaining unit to the Secretaries bargaining unit, as is her desire, she would realize an increase in salary by being included in the classification and pay matrix of the Secretaries Agreement.

8. A revised job description of Ms. Graham's position has been developed, but not yet approved, that titled the position "Art Aide/Secretary" and generally depicts secretarial and clerical duties.

9. The position of Central Office Clerk/Typist was newly created by the Respondent and has not yet been included in any bargaining unit. The duties and responsibilities of this position encompass support clerical/secretarial work tied with Federal programs in the areas of drug and alcohol abuse, sexual abuse, and Indian Education. This position is assigned as support to supervisors and coordinators including the Middle

1 School/Health/Care I Coordinator, School Nurse, and Indian
2 Education Coordinator. These supervisors and coordinators process
3 student problems relative to highly sensitive and extremely
4 confidential material in the areas of sexual abuse, drug and
5 alcohol abuse, and certain diseases which may fall under the
6 umbrella of Federally mandated confidential controls. This
7 position has no involvement in any manner with labor relations in
8 behalf of the Respondent.

9 V. DISCUSSION

10 The Montana Supreme Court has approved the practice of the
11 Board of Personnel Appeals in using federal court and NLRB
12 precedents as guidelines in interpreting the Public Employees
13 Collective Bargaining Act (the Act) as the state act is so similar
14 to the federal Labor Management Relations Act (LMRA). State
15 Department of Highways v. Public Employees Craft Council, 165 Mont.
16 349, 529 P.2d 785 (1974), 87 LRRM 2101; AFSCME Local 2390 v. City
17 of Billings, 171 Mont. 20, 555 P.2d 507, 93 LRRM 2753 (1976); State
18 ex rel. Board of Personnel Appeals v. District Court, 183 Mont.
19 223, 598 P.2d 1117, 103 LRRM 2297 (1979); Teamsters Local 45 v.
20 State ex rel. Board of Personnel Appeals, 195 Mont. 272, 635 P.2d
21 1310, 110 LRRM 2012 (1981), City of Great Falls v. Young (Young
22 III), 221 Mont. 13, 686 P.2d 185, 119 LRRM 2682 (1984).

23 The record is clear that the incumbent of the Art Aide
24 position, Melanie Graham, desires to transfer from the Assistants
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1 and Paraprofessional bargaining unit to the Secretaries bargaining
2 unit. Such a transfer would be monetarily beneficial to Ms.
3 Graham. Aside from the discussion of Ms. Graham's desire to
4 transfer into the Secretaries bargaining unit and a comparison of
5 Ms. Graham's work duties to that of typical clerical/secretarial
6 positions, the Petitioner presented no arguments specifically
7 regarding community of interest, fringe benefits, history of
8 collective bargaining, common supervision, common personnel
9 policies, extent of integration of work functions and interchange
10 among employees affected, or commonality of other working
11 conditions. Community of interest among employees has, and
12 continues to be, the fundamental factor in determining the
13 appropriateness of bargaining units. Brown & Root, Inc., 258 NLRB
14 1002, 108 LRRM 1188 (1981). The Art Aide position may have basic
15 day-to-day clerical and/or secretarial duties that are similar to
16 other clerical and/or secretarial positions, however, the thrust of
17 the Art Aide position is to support the art department. The focus
18 of the community of interest factor lies with the involvement in
19 the art department not the position's clerical/secretarial skill
20 level. Secondly, weight is given to the prior bargaining history
21 factor for inclusions/exclusions to bargaining units. Dallas
22 Morning News, 285 NLRB No. 106, 126 LRRM 1346 (1987). In this
23 matter, the Art Aide position has historically been included in the
24 Assistants and Paraprofessional bargaining unit. Evidence
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1 presented indicates a new job description has been developed, but
2 not yet approved, for the Art Aide position. If adopted, the new
3 job description would "transfer" the Art Aide position into an
4 apparent clerical/secretarial position with a new classification
5 title. Should the adoption of the new job description occur, the
6 language of the collective bargaining agreements appears to allow
7 the transformation of the Art Aide position into a
8 clerical/secretarial position, with a new title, and would most
9 likely be appropriately included in the Secretaries bargaining
10 unit. Until such transformation occurs, there appears to be no
11 substantial legal authority to realign the Art Aide position.

12 A "Confidential Employee", as defined in the Public Employees
13 Collective Bargaining Act, is not a statutory employee entitled to
14 the protections of the Act, Section 39-31-103(2)(b)(v), MCA.

15 "Confidential employee" means any person found by the
16 board to be a confidential labor relations employee and
17 any person employed in the personnel division, department
18 of administration, who acts with discretionary authority
19 in the creation or revision of state classifications
20 specifications. Section 39-31-103(12), MCA.

21 In 1981 the United States Supreme Court affirmed the NLRB's
22 long-standing policy of narrowly defining "confidential employees"
23 as those who "assist and act in a confidential capacity to persons
24 who exercise 'managerial' functions in the field of labor
25 relations", NLRB v. Hendricks County Rural Electric Membership
Corp., 454 U.S. 170 (1981).

1 The Court found the Board had limited the
2 "confidential employee" category to those employees
3 who assist and act in a confidential capacity to
4 persons who formulate, determine and effectuate
5 management policies in the field of labor relations
6 or who have regular access to confidential
7 information concerning anticipated changes which
8 may result from collective bargaining, (citations
9 omitted). The Court concluded the Board's policy
was "rooted firmly in the Board's understanding of
the nature of the collective bargaining practice
and Congress' acceptance of that practice", 454
U.S. at 190. Mukamal and Grenig, "Collective
Bargaining: The Exclusion of "Confidential" and
"Managerial" Employees, 22 Duquesne Law Review 1,
(1983).

10 In a separate opinion concurring in part and dissenting in
11 part, four justices agreed that an employee's possession of
12 "proprietary or nonpublic business information" did not mandate
13 exclusion from a bargaining unit as "confidential".

14 The NLRB has repeatedly held that the mere handling of or
15 access to confidential business or even labor relations information
16 is insufficient to render a person an excluded "confidential"
17 employee, Ernst & Ernst Nat'l Warehouse, 228 NLRB 162, 100 LRRM
18 1297 (1979).

19 The Board of Personnel Appeals has consistently followed the
20 NLRB's narrow exclusion of "confidential employees".

21 (T)he criteria used by the Board of Personnel
22 Appeals to determine whether one is a confidential
23 labor relations employee should be those set forth
24 in Siemens Corp., 224 NLRB 1579, 92 LRRM 1455
25 (1976). There the National Labor Relations Board
held that if the employee acts in a confidential
capacity, during the normal course of duties, to a
person who is involved in formulating, determining

1 and effectuating the employer's labor relations
2 policy, he or she should be excluded from any
3 appropriate unit. Lewis & Clark County v. MPEA, UC
4 4-79 (1980).

5 Access to information that may be used during labor
6 negotiations or responsibility for compiling
7 information that might be related to labor
8 relations is not sufficient to exclude an employee
9 as confidential. AFSCME & Havre School District
10 #16-A, UD 24-79 (1980).

11 On one hand the employee or position occupied by
12 the employee must act, or have the responsibility
13 of acting, in a confidential capacity...(On the
14 other hand the superior must be involved in labor
15 relations to the degree suggested previously...
16 Confidential exclusions...should be construed
17 narrowly...(They) should not apply unless the
18 superior has significant involvement in
19 formulating...and then only if the employee's
20 primary duty is to assist such superior. MPEA &
21 Yellowstone County School District No. 2, UD 7-80
22 (1981).

23 No evidence was presented that indicates the Central Office
24 Clerk/Typist position was even remotely involved in labor
25 relations. Respondent's evidence at hearing and post-hearing
arguments are clear attempts to expand the definition of
"confidential employee" in the collective bargaining arena. The
record is clear the Central Office Clerk/Typist position is exposed
to highly sensitive and confidential information concerning
personal data of students and students' families. However, such
information, no matter the degree of sensitivity, is not related,
in any fashion, to labor relations and could not jeopardize the

1 interests of either the Respondent or Petitioner in their
2 collective bargaining relationship.

3 VI. CONCLUSIONS OF LAW

4 1. The Board of Personnel Appeals has jurisdiction in this
5 matter pursuant to Section 39-31-202 MCA. Billings Montana vs.
6 Fire Fighters Local 529, 113 LRRM 3324, 651 P.2d 627, Montana
7 Supreme Court 1982.

8 2. The position of Art Aide is appropriately included in the
9 Assistants and Paraprofessional bargaining unit.

10 3. The position of Central Office Clerk/Typist is not of a
11 confidential nature in terms of labor relations and would be
12 appropriately included in the Secretaries bargaining unit.

13 VII. RECOMMENDED ORDER

14 The position of Central Office Clerk/Typist shall be included
15 in the bargaining unit represented by the Missoula Elementary
16 Secretary's Classified Association, MEA, NEA.

17 DATED this 4th day of December, 1991.

18 BOARD OF PERSONNEL APPEALS

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21 By:



22 STAN GERKE
23 Hearing Examiner
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2 SPECIAL NOTICE

3 In accordance with Board's Rule ARM 24.25.107(2), the above
4 RECOMMENDED ORDER shall become the FINAL ORDER of this Board unless
5 written exceptions are filed within 20 days after service of these
6 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDED ORDER upon
7 the Parties.

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DATED this 14th day of December, 1991.

Michele Bailey

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